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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 825

JOHN O'C. FITZGERALD, PETITIONER

v.

THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the Memorandum and Order entered by the district court (Pet. App. 40–45) nor the order entered by the court of appeals (Pet. App. 49–50) has yet been reported.

JURISDICTION

The order of the court of appeals, denying the petition for a writ of prohibition or mandamus, was entered on February 27, 1962 (Pet. 49). The petition for a writ of certiorari was filed on March 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in denying a petition for a writ of prohibition or mandamus, which was sought by petitioner to prevent his retrial.

2. Whether, following the discharge of a jury unable to agree, petitioner could be retried without violating the double jeopardy prohibitions of the Fifth Amendment.

STATEMENT

Petitioner was charged by information in the United States District Court for the Northern District of Illinois with wilfully failing to file income tax returns for the years 1954 and 1955, in violation of 26 U.S.C. 7203 (Pet. App. 27–28). On June 6, 1961, after some thirteen trial days, the jury retired to consider their verdict at about 4:00 p.m. Immediately thereafter, the presiding judge in his chambers informed petitioner, his attorney, Charles F. Marino, and the attorney for the government that the jury would be discharged if they did not reach a verdict by ten o'clock that evening. The judge instructed the United States Deputy Marshal to discharge the jury if they were unable to agree by that time (Pet. App. 30). The jury, not having reached a verdict by 10:00 p.m., were accordingly discharged by the United States Deputy Marshal (Pet. App. 31). Neither the presiding judge, petitioner, nor the attorneys were present at the time of the discharge (Pet. App. 31), but all were present the following morning in court when the Deputy Clerk announced that the case had

ended with a hung jury (Pet. App. 32). The case was thereupon set for a new trial.

In December 1961, petitioner filed a motion in the United States District Court seeking alternatively a judgment of acquittal or an order dismissing the offenses charged in the Information, on the grounds that a retrial would place him in double jeopardy for the same offense (Pet. App. 34). Petitioner alleged that the trial judge had abused his discretion in that he had not taken "into consideration the circumstances which existed at the time the jury was discharged * * *" and had improperly "delegated his discretionary power to discharge the jury to the Deputy Marshal * * *." He further alleged that the discharge of the jury had been wrongful because "neither the defendant nor his attorney were present at the time of the discharge." (Pet. App. 38.) The district court denied the motion. After noting the colloquy which had taken place in chambers after the jury had retired to consider its verdict (Pet. App. 41–42), the court found that "the trial judge made a deliberate decision as to when the jury should be discharged for failure to agree, that it was the trial judge's decision and not his minute clerk's, that it was announced in the presence of counsel." The court concluded that the presiding judge had "exercised the discretion lodged in him in accordance with the best dictates of his judgment," and, accordingly, on the authority of *United States* v. *Perez*, 9 Wheat. 579, held that a retrial of petitioner would not subject him "to double jeopardy for the same offense." (Pet. App. 45.)

On February 21, 1962, petitioner filed a petition for a writ of prohibition, or a writ of mandamus, or both, in the United States Court of Appeals for the Seventh Circuit, praying that the United States District Court, or any judge thereof, be prohibited from trying petitioner a second time (Pet. App. 17–24). The petition set forth substantially the same allegations of error which were contained in the lower court motion and further alleged that "petitioner did not consent to the discharge of the jury without a verdict having been reached by them" (Pet. App. 22). The court of appeals denied the petition (Pet. App. 49–50).

ARGUMENT

1. The court of appeals properly declined to grant the petition for a writ of prohibition or mandamus. See *Parr* v. *United States*, 351 U.S. 513, 520–521; *Banker's Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383–385; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21. No special circumstances existed which would have justified such extraordinary relief. See *U.S. Alkali Assn.* v. *United States*, 325 U.S. 196, 202–203. "[E]xtraordinary writs * * * may not be used to thwart the congressional policy against piecemeal appeals," (*Parr* v. *United States, supra*, 351 U.S. at 520–521), especially in a criminal case (cf. *Cobbledick* v. *United States*, 309 U.S. 323). If petitioner be convicted on retrial, and that conviction be affirmed, it would then be time enough to determine whether the merits of the district court's order warranted review by this Court.

2. Petitioner's contentions are in any event without merit. Under the settled principles first announced in *United States* v. *Perez*, 9 Wheat. 579 (see Pet. App. 42–43), and consistently followed by this Court (see *Simmons* v. *United States*, 142 U.S. 148, 153–154; *Logan* v. *United States*, 144 U.S. 263, 297–298; *Thompson* v. *United States*, 155 U.S. 271, 274; *Wade* v. *Hunter*, 336 U.S. 684, 689), a district court has broad discretion to determine whether or not and under what circumstances the jury should be discharged. The exercise of this discretion should not be disturbed on review, except under the most unusual circumstances (see *Gori* v. *United States*, 367 U.S. 364, 369). Especially do these principles hold true in the present case wherein the petitioner offered no objection to the trial court's announced intention to discharge the jury at 10:00 p.m. in the event that the jurors were unable to agree (see Pet. App. 41–42).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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